



IT IS SO ORDERED.
Signed March 5, 2014

A handwritten signature in black ink, reading "Arthur S. Weissbrodt".

Arthur S. Weissbrodt
~~U.S. Bankruptcy Judge~~
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

| | | |
|----------------------------|---|------------------------|
| In re |] | Case No. 13-51381-ASW |
| |] | |
| |] | |
| THUAN NGUYEN and HANH GIAO |] | |
| NGUYEN, |] | Chapter 7 |
| |] | |
| Debtors. |] | |
| |] | |
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| VIEN THAO MEDIA, |] | Adv. Proc. No. 13-5082 |
| |] | |
| Plaintiff, |] | |
| |] | |
| vs. |] | Date: January 23, 2014 |
| |] | |
| THUAN NGUYEN and HANH GIAO |] | |
| NGUYEN, |] | Time: 9:00 a.m. |
| |] | |
| Defendants. |] | |
| |] | |
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MEMORANDUM DECISION AND ORDER AFTER TRIAL

This matter came before the Court for a trial on January 23, 2014. The Plaintiff, Vien Thao Media (hereafter "VTM"), was represented by attorney Alfred Wright. The Defendants, Thuan Nguyen and Hanh Giao Nguyen, who are the Debtors in the underlying bankruptcy case, were represented by attorney Elias Portales.

VTM commenced this adversary proceeding on June 5, 2013. The complaint originally asserted six causes of action, including claims under 11 U.S.C. § 727, but at trial, VTM clarified that VTM

1 was only proceeding with the fifth cause of action alleging fraud
2 under 11 U.S.C. § 523(a)(2)(A), and that VTM was only proceeding
3 with this claim against Defendant Thuan Nguyen, and not against
4 Defendant Hanh Giao Nguyen. As a result, the sole claim alleges
5 that Thuan Nguyen fraudulently induced VTM to continue to allow
6 Thuan Nguyen to use air time on VTM's radio station without
7 intending to pay for such use.

8 The witnesses at trial were Tron Do (hereafter "Mr. Do") and
9 Thuan Nguyen (hereafter "Mr. Nguyen").¹ Having considered the
10 testimony of these witnesses, the evidence offered at trial,² and
11 the written and oral arguments of counsel, the Court finds and
12 concludes that VTM has not established that the debt owed by Mr.
13 Nguyen to VTM is nondischargeable under § 523(a)(2)(A).

14
15 I. Findings of Fact

16 VTM and HDR Communications (hereafter "HDR") entered into a
17 written contract in which VTM agreed to provide air time to HDR on
18 an AM radio station. According to the testimony of Mr. Nguyen, HDR
19 is a business which has been in operation since early 2000, is
20 still in operation today, and is a dba for Mr. Nguyen.

21 Mr. Do explained the nature of the parties' business
22 relationship, and in this regard, Mr. Do's testimony was unrefuted.
23 Mr. Do testified that VTM is in the business of reselling air time

24
25 ¹ Both witnesses, but Mr. Do in particular, had limited
26 proficiency in the English language. At times, their testimony was
27 difficult to follow and comprehend. The Court has, to the best of
its ability, attempted to ascertain these witnesses' actual
testimony.

28 ² Exhibits 1 through 3 and A through J were admitted pursuant
to a stipulation of the parties.

1 for a Vietnamese radio station, but VTM does not own the station.
2 According to Mr. Do, during February 2011, VTM had an agreement
3 with AM radio station 1290 (KAZA) to purchase air time and to
4 broadcast 24 hours per day. Mr. Do understood, and Mr. Nguyen
5 confirmed, that HDR leased radio air time from VTM to sell
6 advertising spots.

7 The contract between VTM and HDR is dated January 6, 2011, and
8 while the signatures on the contract are not legible, there is no
9 dispute that the contract was binding on the parties in this
10 proceeding. The contract specified a start date of February 3,
11 2011, and an end date of February 2, 2012. Under the contract, HDR
12 agreed to purchase 10 hours of air time per week at \$125 per hour
13 for a total of \$1,250.00 per week between February 3, 2011 and
14 August 4, 2011, and to purchase 10 hours of air time per week
15 (presumably for \$150 per hour, although this figure is omitted from
16 the contract) for a total of \$1,500.00 per week between August 5,
17 2011 and January 27, 2013. According to Mr. Do, and consistent
18 with the contract, HDR agreed to buy 2 hours of air time per day,
19 Monday through Friday.

20 The inclusion of a January 27, 2013 date in the contract is
21 something of a curiosity, because the contract expressly provided
22 for a February 2, 2012 end date. During cross-examination, Mr. Do,
23 who is VTM's president, testified about the January 27, 2013 date
24 when asked about a proposed new contract which would have covered
25 the period of February 3, 2012 through February 2, 2013. Mr. Do
26 testified that despite the February 2, 2012 end date, the original
27 contract ran until January 27, 2013; however, Mr. Do was unable to
28 explain this inconsistency or why there would be a need for a new

1 contract if Mr. Do's assertion were correct. Neither Mr. Nguyen
2 nor his wife signed the proposed new contract. Nevertheless, Mr.
3 Nguyen continued to do business with VTM after the contract's
4 stated end date through July 2012.

5 Mr. Do testified that VTM received payments from Mr. Nguyen
6 for air time under the contract, but the payments were often late.
7 Mr. Do stated that Mr. Nguyen became delinquent, and for the period
8 of February 2012 until May 2012, owed approximately \$19,800.00.
9 Mr. Do stated that Mr. Do told Mr. Nguyen that Mr. Nguyen needed to
10 pay for these four months of air time.

11 Mr. Nguyen did not dispute the delinquency. In fact, Mr.
12 Nguyen testified that in January 2012, HDR's business had slowed
13 down.

14 Mr. Do testified that Mr. Nguyen sometimes gave Mr. Do post-
15 dated checks for amounts past due. According to Mr. Do, at end of
16 May 2012, Mr. Nguyen provided Mr. Do with three post-dated checks
17 dated June 8, 2012, June 29, 2012, and July 13, 2012, and that
18 these checks totaled approximately \$18,600.00. These were the only
19 three checks which Mr. Do identified as having been post-dated.

20 The three post-dated checks for June 8, June 29, and July 13
21 were admitted in evidence. All three checks were made payable to
22 VTM, and were signed by Mr. Nguyen on behalf of HDR. The first
23 check was dated June 8, 2012, was in the amount of \$6,300.00, and
24 contained a notation "Mar 2012."³ The second check was dated June
25 29, 2012, was also in the amount of \$6,300.00, and contained a
26 notation "April 2012." The third check was dated July 13, 2012,

27
28 ³ Inexplicably, Mr. Nguyen testified that the June 8 check was
for the month of May.

1 was in the amount of \$5,880.00, and contained a notation "May
2 2012."

3 Mr. Nguyen admitted to providing these post-dated checks to
4 Mr. Do, but was not certain whether Mr. Nguyen did so at the end of
5 May or in early June. Mr. Nguyen conceded that with regard to the
6 three post-dated checks for June 8, June 29, and July 13, Mr.
7 Nguyen lacked sufficient funds to cover the checks when the checks
8 were written. However, Mr. Nguyen also testified that it was Mr.
9 Nguyen's intention to make every effort to obtain the funds to make
10 payment.

11 Mr. Do testified that the post-dated checks were Mr. Nguyen's
12 idea; Mr. Nguyen testified to the opposite. On this point, and for
13 the following reasons, the Court finds that VTM has not
14 established, by a preponderance of the evidence, that it was Mr.
15 Nguyen's idea to post-date the checks.

16 This is, in large part, because Mr. Do's testimony was
17 illogical with regard to a separate set of three checks. According
18 to Mr. Nguyen, in late January 2012, Mr. Do and another individual
19 came, unannounced, to Mr. Nguyen's office and demanded payment.
20 Mr. Nguyen testified that during the January visit, Mr. Nguyen was
21 intimidated by Mr. Do, and Mr. Do required Mr. Nguyen to provide
22 three post-dated checks for February 8, February 28, and March 15,
23 2012, in the amounts of \$5,500.00, \$5,500.00, and \$8,500.00,
24 respectively. Mr. Nguyen testified that Mr. Do made a handwritten
25 notation describing these three checks on an invoice dated January
26 30, 2012. However, according to Mr. Do, Mr. Do received these
27 checks on February 8, February 28, and March 15, and the checks
28 were not post-dated. Mr. Do also denied making any visit to Mr.

1 Nguyen's office in January 2012, and denied making any attempt to
2 intimidate Mr. Nguyen. Mr. Do did not deny making the handwritten
3 notation on the invoice.

4 Mr. Do's testimony in this regard is problematic. The
5 February 8, February 28, and March 15 checks were sequential and
6 were numbered 1089, 1090, and 1091. It is highly unlikely that
7 these checks were written on separate dates. The record shows
8 several other checks paid by HDR to VTM over the period in which
9 the parties did business, but the only other time checks were
10 written sequentially was when HDR provided VTM with the three post-
11 dated checks at the end of May (or in early June) 2012. Even VTM's
12 own counsel believed that Mr. Nguyen had provided post-dated checks
13 to Mr. Do in January 2012, and said as much during closing
14 argument.⁴

15 Mr. Do and Mr. Nguyen offered conflicting testimony on how the
16 parties agreed the post-dated checks were to be treated. Mr. Do
17 testified that it was Mr. Do's understanding that Mr. Do was to
18 cash the checks on each check's date. By contrast, Mr. Nguyen
19 testified that in January 2012, Mr. Nguyen and Mr. Do verbally
20 agreed that Mr. Do would not cash any post-dated checks until after
21 Mr. Nguyen had an opportunity to confirm with Mr. Do that there was
22 money in the account to cover the checks. On this point, the Court
23 finds that Mr. Nguyen likely told Mr. Do not to cash any post-dated
24 checks until after confirming with Mr. Nguyen that there were
25 sufficient funds in the account to cover the checks.

26
27 ⁴ During closing argument, Mr. Do's counsel cited post-dated
28 checks from January 2012 as being an example of an instance when
Mr. Nguyen provided post-dated checks which Mr. Nguyen later
honored.

1 Regardless of what the parties agreed, there is no dispute
2 that Mr. Do attempted to cash the June 8 check, without success.
3 Mr. Nguyen testified that on June 6, Mr. Nguyen spoke with Mr. Do
4 and told Mr. Do that there was not sufficient money in the account
5 and asked Mr. Do to wait to cash the June 8 check. According to
6 Mr. Nguyen, Mr. Do refused, then attempted to cash the check, which
7 bounced. Mr. Nguyen testified that Mr. Nguyen then put a stop
8 payment order on the June 8 check.

9 Consistent with Mr. Nguyen, Mr. Do testified that Mr. Do
10 talked to Mr. Nguyen on June 14, 2012, about the June 8 check and
11 the stop payment order, and that Mr. Do told Mr. Nguyen that Mr.
12 Nguyen needed to make payment. Mr. Do testified that Mr. Do would
13 not have allowed Mr. Nguyen to use the air time after June 8, 2012,
14 if Mr. Do had known that Mr. Nguyen would stop payment on the June
15 8 check. As for the June 29 check, Mr. Do testified that Mr. Do
16 went to the bank, and the bank told Mr. Do that there were
17 insufficient funds to cash the check. Regarding the July 13 check,
18 Mr. Do testified that Mr. Do did not attempt to do anything with
19 it, and never tried to cash the check.

20 However, Mr. Do's testimony regarding the three post-dated
21 checks received in May (or June) 2012 was confusing and/or
22 internally inconsistent in other respects. Mr. Do testified that
23 Mr. Nguyen stated that Mr. Nguyen would provide a cashier's check
24 to replace the June 29 and July 13 checks, but it "never happened."
25 However, there was evidence that Mr. Nguyen provided almost
26 \$9,000.00 in certified funds to VTM after the June 8 check was
27 dishonored. According to Mr. Do, Mr. Do cut off Mr. Nguyen's air
28

1 time between June 23 to July 7 for non-payment,⁵ but Mr. Do stated
2 that after the air time was cut off, Mr. Nguyen paid \$3,000.00 by
3 cashier's check (ending 0798) to Mr. Do on June 21 -- which was
4 before, not after, the suspension in service. Also, Mr. Do
5 testified that Mr. Do received a cashier's check from Mr. Nguyen on
6 July 19, 2012 (ending 7394) in the amount of \$3,450.00 to cover the
7 February to May deficiency. Mr. Do also testified to Mr. Do's
8 receipt of another cashier's check from Mr. Nguyen dated July 7,
9 2012 (ending 0830) in the amount of \$2,500.00 with a notation by
10 Mr. Nguyen that the check was "for July 9, 2012 to July 31, 2012."

11 There was testimony about two separate instances in which
12 HDR's air time was suspended. There was the two-week period in
13 June and July 2012 when HDR's air time was suspended for non-
14 payment,⁶ but there was also an earlier instance in which HDR lost
15 air time. Mr. Do testified that for a period of three days in May
16 2012, there was a technical problem involving PG&E and a tower in
17 Morgan Hill which prevented HDR from having its air time, and HDR
18 was not charged for these days. Mr. Do stated that nothing was
19 broadcast during these three days, not even music. Mr. Nguyen's
20 testimony on this point was contradictory; according to Mr. Nguyen,
21 the station broadcast music during those three days, leading Mr.
22 Nguyen to believe that only HDR was affected.

23 Regardless of the reason for this three-day loss in air time,
24 which the Court need not resolve, the evidence is unrefuted that

25 ⁵ On cross-examination, Mr. Do testified that the air time was
26 terminated from June 25 to July 6.

27 ⁶ Mr. Do testified that Mr. Do was capable of selling that
28 time to someone else, but did not do so. Mr. Do did not bill HDR
for that time.

1 the loss had an impact on HDR's business. Mr. Nguyen explained
2 that HDR lost over 50% of its income after the loss in air time,
3 based on a loss in advertising revenue.

4 For this and other reasons, Mr. Nguyen testified that HDR
5 wanted to reduce its air time from two hours to one hour per day,
6 and made a request for such a reduction in May 2012. According to
7 Mr. Do, HDR made no such request in May 2012. According to Mr.
8 Nguyen, HDR made this request not only because of the loss in
9 income caused by the loss of air time, but also because of a change
10 in market conditions. Mr. Nguyen testified that increased
11 competition had caused the price for advertising spots to drop from
12 \$15 to \$5 per spot. Mr. Nguyen testified that because of a slowing
13 economy, small businesses were also late in making payment to HDR.
14 Mr. Nguyen stated that in July 2012, HDR's air time was reduced
15 from two hours to one hour per day, but by the end of July, HDR was
16 provided no air time.

17 Mr. Nguyen provided some additional testimony regarding a
18 business operated by Mr. Nguyen's wife. The business was a
19 nutritional consulting business called "Gorgeous U! Nutrition and
20 Wellness" which started doing business in approximately 2011.
21 According to Mr. Nguyen, Mr. Nguyen's wife helped people shop on
22 the internet for products, and the business drew minimal income.

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24
25 II. Conclusions of Law

26 VTM claims that Mr. Nguyen's debt to VTM is not dischargeable
27 pursuant to 11 U.S.C. § 523(a)(2), based upon a misrepresentation.
28 Section 523(a)(2)(A) denies a discharge "for money, property,

1 services, or an extension, renewal, or refinancing of credit, to
2 the extent obtained by (A) false pretenses, a false representation,
3 or actual fraud, other than a statement respecting the debtor's or
4 an insider's financial condition." To establish a claim of fraud
5 under this section, a creditor must prove, by a preponderance of
6 the evidence, each of the following five elements:

7 (1) the debtor made a representation;

8 (2) the debtor knew the representation was
9 false at the time he or she made it;

10 (3) the debtor made the representation with the
11 intent to deceive;

12 (4) the creditor justifiably relied on the
13 representation; and

14 (5) the creditor sustained damage as a
proximate result of the misrepresentation
having been made.

15 Van Zandt v. Mbunda (In re Mbunda), 484 B.R. 344, 350 (B.A.P. 9th
16 Cir. 2012) (citing Ghomeshi v. Sabban (In re Sabban), 600 F.3d
17 1219, 1222 (9th Cir. 2010)).

18 At trial, VTM's attorney conceded that, at best, VTM could
19 only prove \$600.00 of reasonable reliance and was only seeking
20 damages for June 8, 2012 onward. VTM's attorney made this
21 concession after the Court inquired how VTM could have relied,
22 reasonably, on any assertions that other post-dated checks would be
23 paid after it became clear by June 12, 2012 that there were
24 insufficient funds in the account, when there was no evidence of
25 continued assurances by Mr. Nguyen of payment. VTM's counsel
26 stated that four days of reliance came to \$600.00, total. However,
27 the Court finds that resolution of this claim turns not on
28 justifiable reliance, but on fraudulent intent.

1 The Court will assume, solely for purposes of analysis, that
2 the post-dated checks were the equivalent of false representations
3 by Mr. Nguyen that Mr. Nguyen would make payment in the amounts and
4 on the dates stated on each check. However, there is no direct
5 evidence that Mr. Nguyen lacked any intent to honor the June 8,
6 June 29, or July 13 checks when Mr. Nguyen drafted them.

7 The mere fact that Mr. Nguyen post-dated the June 8, June 29,
8 and July 13 checks is not dispositive of a fraudulent intent.
9 Rather, the post-dating of a check could just as easily signal that
10 the check's maker lacks funds on the date the check is written;
11 otherwise, there is little need to post-date the check.

12 Circumstantially supportive of VTM, the June 8 check bounced,
13 and Mr. Nguyen then stopped payment on the check, which could imply
14 that Mr. Nguyen never intended to make payment. However, the
15 support for VTM's position stops here. Mr. Nguyen testified that
16 Mr. Nguyen intended to make payment if the funds were available,
17 and the availability of funds depended upon payments made to HDR.
18 Mr. Do was also on notice that Mr. Nguyen might lack funds to cover
19 the post-dated checks. Mr. Nguyen had told Mr. Do not to cash any
20 of the post-dated checks until after Mr. Do confirmed with Mr.
21 Nguyen that there were funds in the account to cover the checks.
22 In any event, the court finds that Mr. Do understood, when he
23 received the post-dated checks, that Mr. Nguyen would endeavor to
24 add sufficient funds into his account to cover the checks but that
25 those funds were not in the account when the post-dated checks were
26 given to Mr. Do. Mr. Nguyen also testified that the unexpected
27 three-day interruption in HDR's air time in May 2012 diminished
28 HDR's funds and ability to make payment. After stopping payment on

1 the June 8 check, Mr. Nguyen provided almost \$9,000.00 in certified
2 funds to Mr. Do to enable HDR to continue doing business with VTM.
3 Although the payment of \$9,000.00 did not satisfy the entire
4 deficiency, such payment is circumstantially supportive of Mr.
5 Nguyen's assertion that Mr. Nguyen intended to honor his payment
6 obligations.

7 On this issue, the Court finds that VTM has not met its burden
8 of proof. Moreover, on balance, the evidence supports Mr. Nguyen's
9 assertion that Mr. Nguyen lacked a fraudulent intent. In any
10 event, VTM has the burden of proof on the issue of Mr. Nguyen's
11 alleged fraudulent intent and failed to satisfy that burden.
12 Therefore, the Court concludes that VTM cannot prevail on its claim
13 against Mr. Nguyen.

14
15 III. Conclusion

16 Plaintiff VTM has not established its claim under
17 § 523(a)(2)(A) by a preponderance of the evidence. Therefore,
18 judgment shall enter in favor of the Defendants on such claim.

19 IT IS SO ORDERED.
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Court Service List

** All parties served electronically by ECF